Supreme Court, U.S.
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No. 92-557

In The

Supreme Court of the United States

October Term, 1992

JAMES EDWARD CLARK,

Petitioner,

v.

ROBERT POULTON, UTAH STATE CORRECTIONS DEPARTMENT, DAVID JORGENSON, SALT LAKE COUNTY SHERIFF'S OFFICE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the instant action was correctly referred to United States Magistrate Judge Boyce pursuant to 28 U.S.C. § 636(b)(1)(B) as a "prisoner petition challenging conditions of confinement."

2. Whether referral of the instant action to United States Magistrate Judge Boyce was proper pursuant to 28 U.S.C. § 636(b)(3) as "such additional duties as are not inconsistent with the Constitution and laws of the United States."

3. Whether the plaintiff's stipulation that the claims against the State of Utah and those against Salt Lake County could be consolidated for the purposes of an evidentiary hearing before United States Magistrate Judge Boyce, and his failure to object to the Magistrate Judge presiding at said evidentiary hearing, constituted either consent or a waiver of any error in the Magistrate Judge conducting the evidentiary hearing.

4. Whether it was error to except at face value the trial court's declaration that it had performed a de novo review of the record, absent any conflicting evidence.

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JAMES EDWARD CLARK,

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ROBERT POULTON, UTAH STATE CORRECTIONS DEPARTMENT, DAVID JORGENSON, SALT LAKE COUNTY SHERIFF'S OFFICE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

Respondents, by and through their attorneys of record, hereby submit their brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit on petition for rehearing is reported at 963 F.2d 1361. The earlier panel opinion is reported at 914 F.2d 1426. The order of United States District Court Judge

David K. Winder dismissing the instant action was unreported, and a copy of it is attached to the Petition for a Writ of Certiorari as Appendix C at 58a-60a. The Report and Recommendation of United States Magistrate Judge Boyce was unreported, and a copy of it is attached to the Petition for a Writ of Certiorari as Appendix D at 61a-71a.

JURISDICTION

The judgment that petitioner seeks to review was entered on May 11, 1992. Petitioner filed a petition for rehearing with suggestion for rehearing en banc that was denied by an order dated July 1, 1992. This Court has jurisdiction over the instant action pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The only statute involved in the instant action is 28 U.S.C § 636. The full text of this statute has been included in the Petition for a Writ of Certiorari as Appendix G at 76a-82a.

STATEMENT OF THE CASE

Petitioner James Edward Clark brought the instant action pursuant to 42 U.S.C. § 1983 in April of 1986. The defendants were the Utah State Corrections Department, state parole officer Robert Poulton, Salt Lake County Sheriff's Office, and Salt Lake County officer David

Jorgenson. Mr. Clark alleged that his constitutional rights were violated by Officers Poulton and Jorgenson's excessive use of force. The claims against Officer Poulton and the State of Utah arose while Mr. Clark was being booked by Officer Poulton. Mr. Clark, a parolee under the supervision of the State of Utah, was arrested by his parole officer, Mr. Poulton, at the State of Utah's Salt Lake County parole office because Mr. Clark was wanted on suspicion of having committed two new armed robberies. After his arrest, Mr. Clark was taken down a hall to be booked. When Mr. Clark objected to being photographed, as part of the booking process, Mr. Poulton allegedly used excessive force to coerce Mr. Clark to permit a photograph to be taken. The claims against Officer Jorgenson and the Salt Lake County Sheriff's Office arose while Mr. Clark was being transported to court by Mr. Jorgenson. Mr. Clark alleges that Officer Jorgenson used excessive force against him in the courthouse elevator, aggravating a prior back injury of Mr. Clark's.

District Court Judge David K. Winder referred this case to Magistrate Judge Ronald N. Boyce pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge presided at an evidentiary hearing in this matter on August 18, 1987. At that hearing, Mr. Clark's trial counsel, Knute Rife, stated on the record that he had consented to the consolidation of the claims against the State of Utah defendants with those against the Salt Lake County defendants for the purposes of the evidentiary hearing before Magistrate Judge Boyce.[1] After the evidentiary hearing, Magistrate

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[1] THE COURT: I think I have to state for the record that at pre-trial conference in this matter, it was agreed among the

Judge Boyce submitted a Report and Recommendation to District Court Judge Winder. Clark filed objections to this Report. On December 31, 1987, Judge Winder, after performing a de novo review, adopted the report and recommendation in all respects and dismissed the instant action. Mr. Clark's pro se notice of appeal was docketed with the Tenth Circuit Court of Appeals on February 9, 1988.

On January 10, 1989, after the original briefing in this matter was completed, the Tenth Circuit Court of Appeals appointed counsel for Clark and ordered, sua sponte, that the parties brief the question of whether 28 U.S.C. § 636 authorized the district court to refer the instant action to a magistrate judge for preparation of proposed findings of fact and recommended disposition. In his brief filed pursuant to this order, Mr. Clark raised for the first time his claim that Judge Winder had not performed a proper de novo review of Magistrate Judge Boyce's Report and Recommendation. After briefing and oral arguments on the jurisdictional question, the majority of the panel of the Tenth Circuit Court of Appeals concluded that the magistrate judge was without subject matter jurisdiction, and remanded this action to the district court. In reaching

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parties that even though these were disparate claims, separate claims that the matters would be consolidated for the purposes of this hearing; is that correct, Mr. Campbell?

MR. CAMPBELL: That is correct, your Honor.

THE COURT: Is that your understanding, Mr. Adamson?

MR. ADAMSON: I was not there, your Honor, but I will –

THE COURT: Mr. Rife?

MR. RIFE: That is my understanding.

(Transcript of Hearing of 8-18-87, p. 48, l. 15-25)

this decision, the majority of the panel defined the term "conditions of confinement" in 28 U.S.C. § 636(b)(1)(B) as meaning ongoing prison practices, but not single incidents that occur in prisons. *Clark v. Poulton*, 914 F.2d 1426, 1429 (10th Cir. 1990). The majority of the panel read this Court's decision in *Gomez v. United States*, 490 U.S. 858 (1989) as compelling the conclusion that the "additional duties" provision of 28 U.S.C. § 636(b)(3) could not authorize a magistrate to conduct a hearing on a prisoner's petition that did not challenge a condition of confinement. The majority of the panel held that the specific articulation of authority found in 28 U.S.C. § 636(b)(1)(B) should be construed as implicitly withholding the authority for magistrate judges to perform other similar duties not so specified. *Clark*, 914 F.2d at 1431.

Defendants-Respondents petitioned the panel of the Tenth Circuit Court of Appeals for a rehearing with a suggestion for rehearing en banc. The Tenth Circuit abated consideration of this petition pending this Court's disposition of *McCarthy v. Bronson*, 111 S.Ct. 1737 (1991). After this Court's decision in *McCarthy*, the Tenth Circuit Court of Appeals ordered the parties to file briefs addressing the impact that *McCarthy* and *Peretz v. United States*, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991), would have on the court's previous decision in this action. The panel of the Tenth Circuit then granted the petition for rehearing, withdrew its previous opinion, and substituted a new opinion in its place. *Clark v. Poulton*, 963 F.2d 1361 (10th Cir. 1992).

In its opinion on rehearing, the panel of the Tenth Circuit, following this Court's decision in *McCarthy*, held

that the term "conditions of confinement" included allegations that prison administrators acted unconstitutionally in isolated incidents. *Clark*, 963 F.2d at 1364. The panel's decision on rehearing, following this Court's decision in *Peretz*, held that the additional duties language of 28 U.S.C. § 636(b)(3) should be broadly interpreted. The panel, on rehearing, held that Clark's lawsuit challenging his treatment while being booked and held in pretrial detention were "comparable in importance" to a prisoner's petition challenging conditions of confinment. *Clark*, 963 F.2d at 1366. The panel of the Tenth Circuit then affirmed the dismissal of Clark's action.

Mr. Clark filed a petition for rehearing and suggestion for rehearing en banc that was denied by the Tenth Circuit on July 1, 1992. Clark then filed the present petition for a writ of certiorari.

ARGUMENT

I. THE INSTANT ACTION WAS PROPERLY REFERRED TO THE MAGISTRATE JUDGE PURSUANT TO 28 U.S.C. § 636(b)(1)(B)

In *McCarthy v. Bronson*, 111 S.Ct. 1733 (1991), this Court held that 28 U.S.C. § 636(b)(1)(B) should be read so as to permit the referral of all petitions by prisoners challenging the conditions of their confinement to magistrate judges. This Court rejected the effort by that petitioner to read that term narrowly so as to create separate categories of prisoner actions, some that could be referred and some that could not.

In the instant action, the petitioner seeks to create similar distinctions between classes of prisoners. Mr. Clark appears to accept the fact that his claims against the Salt Lake County Sheriff's Office and Officer Jorgenson, that arose during his incarceration in the Salt Lake County Jail as a pretrial detainee, challenge conditions of Mr. Clark's confinement at the jail. But Clark then presumes that his claims against the State of Utah and its parole officer, Mr. Poulton, do not challenge conditions of confinement because Mr. Clark was not 'confined' at the time of the complained of events. Mr. Clark's claims against Poulton and the State of Utah are based on incidents that allegedly occurred while Clark was in the custody of Officer Poulton, and was being booked. In his dissent from the original panel decision in this action (914 F.2d at 1435), Judge Anderson correctly pointed out that the definition of "confinement" does not require that the individual be placed within a jail cell, but only that the person is not free to leave. Confinement is the "State of being confined; shut in; imprisoned. Confinement may be by either a moral or a physical restraint, by threats of violence with a present force, or by physical restraint of the person." *Black's Law Dictionary* 270 (5th Ed. 1979).

At the time of the alleged unconstitutional conduct by Officer Poulton, Mr. Clark was clearly in the custody of the State of Utah. He had been arrested and was in the process of being booked. He was not free to leave, but was confined. The fact that he was being booked by the State of Utah, and not across the street in the county jail, should not be significant. If "confinement" is to be read narrowly, as the petitioner desires, it creates the same problems as this Court sought to avoid in adopting a

broad reading of the this term in *McCarthy*. Just as *McCarthy* was an example of how one complaint might involve both allegations of isolated incidents of unconstitutional conduct and challenges to ongoing practices, the instant lawsuit is an example of one lawsuit containing challenges to conditions of confinement both within and without the walls of a prison or jail. Indeed, the claims against the Salt Lake County defendants actually arose out of conduct in a courthouse elevator where Clark was in the custody and control of members of the staff of the jail, not within the actual walls of the Salt Lake County Jail.

To accept Clark's narrow definition of confinement would leave open the question of what actually does confinement consist of. If confining someone by either moral or physical restraint is insufficient, the courts must wrestle with the question of what would be sufficient. Would an inmate in an honor camp, without locks, gates, or fences be "confined?" Is the inmate who is permitted to leave the confines of the prison's walls to work on prison property, and challenges actions taken against him during such work, still "confined?" What if the work detail leaves prison property entirely? As in *McCarthy*, the statute does not contain any language suggesting that prisoner petitions should be divided into subcategories. Rather, the provisions of 28 U.S.C. § 636(b)(1)(B) should be read to apply to all petitions by prisoners challenging the conditions of their confinement, without seeking to subdivide the class of prisoners by the degree of their confinement.

Because the instant action does *not* involve a prisoner's lawsuit concerning actions that occurred before his

confinement, but is solely concerned with Mr. Clark, a prisoner, challenging the conditions under which he was confined, first by the State of Utah and then by Salt Lake County, the reference of this action to Magistrate Judge Boyce pursuant to 28 U.S.C. § 636(b)(1)(B) was correct. The issues that petitioner seeks to have this Court review are not properly presented in this action and, for this reason, the petition for a writ of certiorari should be denied.

II. THE INSTANT ACTION WAS PROPERLY REFERRED TO THE MAGISTRATE JUDGE PURSUANT TO 28 U.S.C. § 636(b)(3)

The petitioner claims that the lower court misinterpreted the authority bestowed by 28 U.S.C. § 636(b)(3). The Tenth Circuit, on petition for rehearing, held that this "catchall" provision should be read expansively to permit the assignment to a magistrate judge of duties that are comparable in importance to those expressly authorized by other provisions of the statute. *Clark*, 963 F.2d at 1365-6. The court held that, because section 636(b)(1)(B) expressly authorized the referral of a prisoner's petition challenging the conditions of confinement to a magistrate judge, that a similar action could also be so referred under section 636(b)(3). This conclusion directly follows form the decision of this Court in *Peretz*.

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended

> strictly to limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause.

Peretz, 115 L.Ed.2d at 820. *Peretz* involved the question of the authority of a magistrate judge, when the defendant raised no objection, to supervise jury selection in a felony case. This Court held that such an additional duty, as important as it is, was authorized under § 636(b)(3). In reaching this decision, this Court held that where the additional duty to be performed under this catchall authorization was not of comparable importance to the specific duties that Congress authorized magistrates to perform without the consent of the parties, it could not be performed over the objection of a party. 115 L.Ed.2d at 819.

That is not the case in the instant action. Even if this Court were to consider the claims concerning the booking incident to not involve a condition of confinement, those claims are still of comparable importance to the specific grant of authority under section 636(b)(1)(B) for magistrate judges to conduct evidentiary hearings concerning petitions of prisoners challenging conditions of confinement. The claim against the State of Utah defendants involves the identical legal question of whether or not a peace officer used excessive force on a prisoner as was presented in the claim against the Salt Lake County defendants which Mr. Clark admits was properly referred to the magistrate judge.

In claiming that there is a conflict between the appealed from decision of the Tenth Circuit and decisions

of the Seventh and Eighth Circuits, Mr. Clark relies upon *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363 (7th Cir. 1990) and *Roberts v. Manson*, 876 F.2d 670 (8th Cir. 1989). Both of these decisions were reached by the respective courts without the benefit of this Court's decision in *Peretz*. The *Roberts* decision strictly construes the additional duties language of section 636(b)(3) and is in direct conflict with *Peretz*. Respondents are at a loss to understand how *Olympia* is in conflict with the Tenth Circuit's decision in this action. In *Olympia*, the Seventh Circuit held that a magistrate judge could not conduct the voir dire of the jury in a civil trial over the objection of a party. The dicta in *Olympia*, requiring that the consent of the parties be obtained, is contrary to *Peretz*, where this Court stated that it was the duty of the party to object to the use of the magistrate judge.

The Tenth Circuit's decision on rehearing does not conflict with the decisions of this Court, but indeed follows them. If there is a conflict between the decision in question and decisions of other courts, it is because those prior decisions of the other circuits were without the benefit of this Court's decision in *Peretz*. The conflict, if any, is between previous decisions of the lower courts and this Court's decision in *Peretz*. For this reason, the petition for a writ of certiorari should not be granted.

III. MR. CLARK'S FAILURE TO OBJECT TO THE MAGISTRATE JUDGE CONDUCTING AN EVIDENTIARY HEARING CONSTITUTED A WAIVER

Assuming, arguendo, that there was no statutory authorization for the referral of the instant matter to the

magistrate judge, the Tenth Circuit correctly decided that such issue was waived by Mr. Clark's failure to object below. *Clark*, 963 F.2d at 1366-7. In seeking to demonstrate a conflict among the circuits, Mr. Clark cites numerous cases involving 28 U.S.C. § 636(c) and its provision for magistrate judges to conduct civil trials with the express consent of the parties, and order entry of judgment. Petition for a Writ of Certiorari at page 19, n. 17. Clark then cites cases that have held, as did the Tenth Circuit in the instant action, that a claim of an improper reference to a magistrate judge under one of the provisions of section 636(b) is waived if the party failed to object in the district court. Petition for a Writ of Certiorari at page 19, n. 18. The petitioner's comparison of "apples to oranges" does not demonstrate a conflict in the circuits. Respondents urge this Court to deny the petition for a writ of certiorari.

The Tenth Circuit's decision is in accordance with the holding of this Court in *Peretz*.

> We agree with the view of the majority of Circuit Judges who have considered this issue, both before and after our decision in *Gomez*, that permitting a magistrate to conduct the voir dire in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act.

115 L.Ed.2d at 824 (footnote omitted). Neither Clark nor his trial counsel ever objected to the role played by Magistrate Judge Boyce in the instant action. Indeed, Clark, as a matter of record, agreed that the claims against the State of Utah could be consolidated with the claims

against Salt Lake County for the purposes of the evidentiary hearing before the magistrate judge. If Clark, or his attorney, had any objections to such a hearing before the magistrate judge, the appropriate time to raise them was in the district court.

In *Peretz*, this Court said that it was "assisted by the reasoning of the Courts of Appeals for the Second, Third, and Seventh Circuits" in the cases of *United States v. Musacchia*, 900 F.2d 493 (2nd Cir. 1990), *United States v. Wey*, 895 F.2d 429 (7th Cir. 1990), and *Government of the Virgin Islands v. Williams*, 892 F.2d 305 (3rd Cir. 1989). *Peretz*, 115 L.Ed. at 820.

This is significant because these are three of the very cases upon which the Tenth Circuit relied in deciding that Clark's failure to object in the district court acted as a waiver of any procedural error that might have occurred in the referral of this action to the magistrate judge. *Clark*, 963 F.2d at 1366-7.

Mr. Clark continually misstates what occurred in the trial court. Magistrate Judge Boyce did not preside over a civil trial such as would require the consent of the parties under 28 U.S.C. § 636(c). The hearing before the magistrate judge was an evidentiary hearing where the district court retained full authority over the action and its resolution. 28 U.S.C. § 636(b)(1)(B). In these circumstances, any defect in the procedure used by the trial court was waived by Mr. Clark's stipulation that the claims against the State of Utah defendants could be heard by the magistrate judge and by his failure to object at any time to the procedure used.

IV. THE DISTRICT COURT CONDUCTED A PROPER DE NOVO REVIEW OF THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

28 U.S.C. § 636(b), in part, provides that within ten (10) days of a magistrate's filing of his recommendation.

> [A]ny party may serve and file written objections to such proposed findings and recommendations . . . a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

The Tenth Circuit Court in *Gee v. Estes*, 829 F.2d 1005, 1008-09 (1987), stated that:

> When objections are made to the magistrate's factual findings based on conflicting testimony or evidence, both § 636(b)(1)(B) and Article III of the United States Constitution require de novo review. . . . In conducting this review, the district court must, at a minimum, listen to a tape recording or read a transcript of the evidentiary hearing.

The district court's statement in the dismissal order that the court "made a de novo review" of the case (Appendix C to the Petition for a Writ of Certiorari at 59a) was properly presumed by the Tenth Circuit on rehearing to mean that the district court had at least listened to the tape recording of the hearing before the magistrate judge prior to dismissing Clark's suit.

In reaching this decision, the Court pointed out that the trial court had the benefit of the Tenth Circuit's decision in *Gee* as to what was required to perform a de novo review. *Clark*, 963 F.2d at 1368. The Court then followed

its rule that it would not look behind a district court's express statement that it had performed the necessary de novo review. *Andrews v. DeLand,* 943 F.2d 1162, 1171 (10th Cir. 1991), *cert. denied,* 112 S.Ct. 1213 (1992).

In attacking this decision, Mr. Clark claims that this Court should presume that the district court failed to comply with the requirements of the law. Petitioner claims that there should be a presumption of error and that District Court Judge Winder had the burden of demonstrating that he did not fail in his duties. Respondents urge this Court to reject such an unusual claim. In support of his position, Clark cites decisions from six circuits. Petition for a Writ of Certiorari at 21-22, n. 20.

None of the cases cited by Mr. Clark are in conflict with the decision of the Tenth Circuit in the instant action. Some of the cases cited by the petitioner do not even address the question of whether the district court judge must read the transcript or listen to the tape recording of the evidentiary hearing conducted by the magistrate judge, let alone consider what statement the trial court must use to demonstrate that it has properly performed a de novo review. *Fowler v. Jones,* 899 F.2d 1088 (11th Cir. 1990) (district court judge permitted magistrate to conduct jury trial); *Jeffrey S. by Ernest S. v. State Bd. of Educ. of Georgia,* 896 F.2d 507 (11th Cir. 1990) (district court judge incorrectly applied "clearly erroneous" standard of review to magistrate's decision); *Hill v. Jenkins,* 603 F.2d 1256 (7th Cir. 1979) (magistrate never filed proposed findings or recommendations, district court signed the proposed findings of facts and conclusions of law proposed by the defendants). Neither the decisions of the Eleventh Circuit nor those of the Seventh Circuit are in

conflict with the Tenth Circuit's decision in the instant action.

Most of the remaining cases cited by Mr. Clark involve cases where the record showed that no transcript or tape recording was available, thereby demonstrating that it was impossible for the district court judge to have properly conducted a de novo review. *Orand v. United States*, 602 F.2d 207 (9th Cir. 1979) (no tape recording and transcript not prepared until three months after district court's order); *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352 (5th Cir. 1980) (record silent as to existence of tape recording and transcript not prepared until two months after district court's order); *Hill v. Duriron Co., Inc.*, 656 F.2d 1208 (6th Cir. 1981) (no transcript available); *Wimmer v. Cook*, 774 F.2d 68 (4th Cir. 1985) (no transcript available). These cases do not conflict with the Tenth Circuit's decision in the instant action. The record in this action affirmatively shows that a tape recording of the evidentiary hearing was available to District Court Judge Winder. Given the state of the law in the Tenth Circuit, it is proper to presume that when Judge Winder stated that he had conducted a de novo review, it meant that he had listened to the tape recording of the hearing. To presume the opposite would be to assume that Judge Winder either was lying or was unaware of the controlling precedent of the Tenth Circuit.

In *United States v. Elsoffer*, 644 F.2d 357 (5th Cir. 1981), the court was concerned by the fact that three days after the district court's order affirming the magistrate's report and recommendation, the district court made statements that seemed to indicate that the court did not know if a transcript of the evidentiary hearing existed. A second

concern to the Fifth Circuit was that the district court judge, instead of specifying that he had performed a de novo review, stated that he had carefully reviewed the magistrate's report and recommendation. In remanding the matter to make sure that a de novo review was, or had, been performed, the court explained:

> While we cannot agree that the conversation is dispositive of the factual question as to whether the transcript was properly considered, we do agree that the remarks are sufficiently ambiguous to cause us to remand in order to be certain that the testimony was considered.

644 F.2d at 359. Unlike the district court judge in *Elsoffer,* Judge Winder clearly states that he has conducted a de novo review. Nothing in *Elsoffer* conflicts with the Tenth Circuit's decision to presume that Judge Winder's statement was truthful. The petitioner also errs in his reading of *Branch v. Martin,* 886 F.2d 1042 (8th Cir. 1989). Mr. Clark states that the Tenth Circuit was wrong in believing that *Branch* introduced a new refinement of the de novo review rule in the Eighth Circuit. In support of this statement, Mr. Clark claims that *Branch* merely followed a prior decision of the Eighth Circuit, *Thompson v. Scurr,* 668 F.2d 998 (8th Cir. 1982). If this were true, it is extremely surprising to realize that the *Branch* court did not cite to the *Thompson* decision. Instead, *Branch* adopted the rules set out in the Tenth Circuit's decision in *Gee, supra,* and the Fourth Circuit's decision in *Wimmer, supra.*

Clark claims that the presumption that District Court Judge Winder performed the de novo review, without any "evidence" to support Judge Winder's statement that he has done so, makes the phrase a mere tautology in as

much as it is presumed to have occurred because the district court said so. And yet Clark does not seem to realize that mandating that the district court place a further shibboleth in its orders, that it has reviewed the transcript or listened to the tape recording of the evidence, will be of no greater weight than the fact that District Court Judge Winder has already stated that he conducted a de novo review (which, by definition, means that he has reviewed the transcript or listened to the tape recording of the evidence). Respondents are at a loss to understand how the one statement by a district court judge is inherently more trustworthy than the other. If the court cannot presume the truthfulness of the trial court's first avowal, of what use is the second?

For this reason, respondents urge this Court to reject the rule of law propounded by the petitioner. For this reason, the petition for a writ of certiorari should not be granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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